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November 13, 2008

Ms. Marlene H. Dortch, Secretary  
Federal Communications Commission  
Office of the Secretary  
445 12th Street, SW  
Washington, DC 20554

Re: **Notice of Written Ex Parte Communication**  
**WC Docket No. 07-245 ("Pole Attachment Proceeding")**

Dear Ms. Dortch:

On behalf of our clients, Allegheny Power, Baltimore Gas and Electric Co., Dayton Power and Light Co., FirstEnergy Corp., Kansas City Power and Light, National Grid and NSTAR (the "*Coalition of Concerned Utilities*"), the following comments are submitted responsive to the recent *ex parte* presentations in the above-captioned proceeding by ATT/Verizon and USTelecom. ATT/Verizon and USTelecom propose certain regulated pole attachment rates for broadband providers, including Incumbent Local Exchange Carriers ("ILECs").<sup>1</sup>

The *Coalition* recognizes that there are promising aspects of the ATT/Verizon and USTelecom proposals. For instance, the ATT/Verizon Proposal concedes that "Unusable Space" -- i.e., space used in common by *all* attachers -- should be split equally by *all* attachers, and the USTelecom Proposal acknowledges that there are on average only three attaching entities, including the Pole Owner, on a pole. The Coalition supports both of these positions. On balance, however, the proposals must be rejected.

The Commission simply lacks any statutory authority to assert jurisdiction over ILEC attachment rates. ILECs also have no legitimate claim to an equivalent rate because they already have negotiated huge advantages over cable companies and competitive local exchange carriers ("CLECs") that are contained in their longstanding joint use and joint ownership agreements with fellow pole owners. Furthermore, the proposals are insufficient to protect Electric Utilities or to compensate them fairly for the use of their distribution poles. They also ignore the plight of Electric Utilities required to seek access to ILEC poles for their own attachments.

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<sup>1</sup> Letter to Marlene Dortch, Secretary, FCC, from AT&T and Verizon, dated October 21, 2008 ("ATT/Verizon Proposal") and Letter to Marlene Dortch, Secretary, FCC, from USTelecom, dated October 27, 2008 ("USTelecom Proposal").

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As explained below and in the *Coalition's* Comments, the solution to providing pole attachment "rate parity" for broadband providers is to eliminate the highly objectionable and longstanding subsidies in existing FCC rate formulas, not unfairly to reduce ILEC rates.

**1. No Jurisdiction.** The Commission lacks statutory authority necessary to upset many decades of joint use arrangements between telephone companies and electric utilities and to supplant them with regulated ILEC pole attachment rates.<sup>2</sup> The ILECs' novel statutory argument that they only recently "discovered" -- 10 years after the fact -- that they were excluded from any statutory right of access to utility poles but are now somehow entitled to receive regulated pole attachment rates does not pass the "legal laugh test." The *Coalition* objects to any government mandated attachment rates for ILECs.

**2. General Comments.** Even if the Commission possessed the statutory authority necessary to mandate ILEC pole attachment rates (which it does not), numerous other aspects of the ATT/Verizon and USTelecom proposals are highly objectionable to the *Coalition*:

- a. Jointly Owned Poles.** Both proposals make recommendations regarding pole attachment rental rates for poles subject to Joint Use (*i.e.*, when either an Electric Utility or an ILEC owns poles and the other attaches), but fail to acknowledge or even attempt to address the impact on Joint Ownership poles (*i.e.*, when an Electric Utility and an ILEC both own a portion of the same poles and both attach). *Coalition* members jointly own with ILECs some 4 million poles. Since these poles are jointly-owned, no annual rentals are exchanged. As a result, there is no annual rental to increase or decrease. Jointly-owned poles, therefore, should be excluded from the ILECs' rate proposals.
- b. Electric Utility Access to ILEC Poles.** Both proposals are one-sided. While restricting what Electric Utilities may charge ILECs for access to and use of Electric Utility poles, neither proposal addresses the terms and conditions under which Electric Utilities may access and use ILEC poles. The USTelecom proposal goes so far as to state that it is "not proposing that Electric Utilities necessarily pay a fixed percentage of pole costs when they attach non-broadband facilities to ILEC-owned poles, but rather that this percentage be used only in determining how much of Electric Utility-owned pole costs should be fairly recovered from third-party attachers."<sup>3</sup>

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<sup>2</sup> See, Comments by Coalition of Concerned Utilities in WC Docket No. 07-245 ("*Coalition Comments*"), March 7, 2008, pp. 61-70.

<sup>3</sup> USTelecom Proposal, p. 4, n. 12.



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- c. **Unfair Competitive Advantage for ILECs.** Both proposals would establish the same attachment rate for ILEC, cable and CLEC broadband providers. Granting ILECs the same rate as cable and CLEC providers, however, would confer a substantial, unfair advantage upon ILECs relative to their broadband competitors. Joint Use and Joint Ownership agreements already routinely provide numerous benefits to ILECs that are not available to cable and CLEC providers. Among other things, ILECs have much greater independence in making attachments and avoiding the make-ready expenses, application expenses, pre-construction expenses and post-construction expenses that third party licensee attachers incur. They are often directly involved in joint planning of new pole line construction. Joint Use and Joint Ownership contracts recognize that ILECs use more space on the poles. In fact, ILECs have typically negotiated for three (3) or more feet of usable pole space to accommodate existing and future ILEC attachments. ILECs also are able to dispense with the application and approval processes that may slow down their third party licensee competitors.<sup>4</sup>
- d. **False Joint Use Assumptions.** Underlying both proposals is the false assumption that ILECs are somehow being mistreated by their Electric Utility joint use partners now that ILECs own and maintain fewer poles than the Electric Utilities. The current disparity in pole ownership has been self-created by the ILECs. ILECs have chosen to own fewer poles. In large part because ILECs have cut back on their joint use responsibilities as competition has reduced their number of wireline subscribers, Electric Utilities have been required to increase their ownership and maintenance of joint use poles. Meanwhile, Electric Utilities remain completely dependent upon ILECs for access to Joint Use poles owned by ILECs, regardless of the specific percentage owned by ILECs. ILECs have used this leverage over the years to continue abdicating their joint use or joint ownership responsibilities, leaving electric utilities to shoulder a disproportionate burden of pole ownership.<sup>5</sup>
- e. **Unauthorized Attachments.** Both proposals downplay the massive problem of Unauthorized Attachments. USTelecom falsely claims that Electric Utilities somehow benefit from the epidemic of Unauthorized Attachments (a preposterous proposition on its face) but concedes that the Commission should allow penalties in attachment agreements “to the extent that Electric Utilities believe that Commission precedent prohibits any such penalties beyond back-payment.”<sup>6</sup> USTA also recommends that the Commission establish “significant penalties

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<sup>4</sup> See, *Coalition Comments* at pp. 53-56.

<sup>5</sup> See, *Coalition Comments* at pp. 56-61.

<sup>6</sup> USTelecom Proposal, p.7.

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...where there is a showing of willful or repeated instances of unauthorized attachments by the same company.”<sup>7</sup> The ATT/Verizon proposal does not even address Unauthorized Attachments. The *Coalition* proposed in its Comments reasonable penalties for Unauthorized Attachments, and they should be adopted by the Commission.<sup>8</sup>

- f. **Safety Violation Penalties.** Neither proposal speaks to the substantial, historic and continuing problem of safety violations created by attachers on Electric Utility poles. The explosive use of poles by newly formed telecommunications companies, competitive pressures and speed to market has resulted in growing safety concerns. The *Coalition* proposed in its Comments reasonable penalties for Safety Violations, and they should be adopted by the Commission.<sup>9</sup>
- g. **Rural Broadband.** USTelecom argues that lower pole attachment rates are essential to promote rural broadband deployment. To the contrary, as the *Coalition* pointed out in its *ex parte* filings in this proceeding, broadband has not been deployed throughout rural America because of profitability concerns and disproportionately high infrastructure costs, not pole attachment rates.<sup>10</sup>
- h. **Existing Agreements.** The ATT/Verizon and USTelecom proposals would mandate attachment rates and override existing, inconsistent rates contained in detailed, long-standing and highly negotiated agreements. It would be grossly unfair and legally questionable for an agency to mandate the unilateral reform of only one aspect of complex agreements that involved “give and take” on numerous, interconnected provisions.
- i. **“Excessive” Rates.** Despite unsupported claims by the ILECs, broadband providers are *not* currently forced to pay “excessive pole attachment rates.”<sup>11</sup> Some attachers receive lower subsidies than others, but neither the cable/CLEC rates nor ILEC rate can under any stretch of the imagination be deemed “excessive.”
- j. **Level Playing Fields.** Notwithstanding the ILECs’ arguments, there is more to the Commission’s pole attachment proceeding than “leveling the playing field” for broadband providers. For instance, “leveling the playing field” between Electric Utilities and attachers by eliminating unfair subsidies should be a key

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<sup>7</sup> *Id.*

<sup>8</sup> *See*, Coalition Comments, p.71-75.

<sup>9</sup> *Id.*

<sup>10</sup> *See*, Letter to Marlene Dortch, Secretary, FCC, from the *Coalition of Concerned Utilities*, dated August 24, 2008.

<sup>11</sup> ATT/Verizon Proposal, p. 1.



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aspect of the Commission's deliberations -- especially in an era of deep concern over raising energy rates for electric utility consumers across the country.

**3. Problems with Specific Proposals.** While objecting to mandated ILEC pole attachment rates as a jurisdictional matter, the *Coalition* comments below on specific aspects of ATT/Verizon's and USTA's proposals.

- a. **ATT/Verizon Proposal.** Despite their claims, the ATT/Verizon Proposal is not "demonstrably equitable."<sup>12</sup> It favors ILECs at the expense of Electric Utilities and their consumers.
  - i. **"Unusable" (Common) Space Allocations.** ATT/Verizon recommend an equal sharing of the Common Space (a concept advanced by the *Coalition*).<sup>13</sup> The *Coalition* applauds this late recognition that all parties benefit equally from the Common Space.
  - ii. **Communications Worker Safety Zone.** ATT and Verizon propose no change in the FCC's allocation of the entire 40-inch Communications Worker Safety Zone ("CWSZ") to the Pole Owner. The CWSZ, however, is required on the pole *solely because of* the presence of communications workers. It is akin to a lion's cage that protects humans, not the lion. The *Coalition* stands by its original Comments agreeing to split the CWSZ costs equally along with other common costs (even though in fairness the costs should be allocated entirely to the attachers) but does not agree that Pole Owners should absorb all of the CWSZ costs as proposed by the ILECs. If CWSZ costs were split equally rather than allocated entirely to the Pole Owner, ATT/Verizon's proposed Broadband Rate would increase from approximately 18.7% to 20.89%.
  - iii. **Presumed Number of Attachers.** According to ATT/Verizon, the record evidence in this proceeding shows that, on average, there are 3-4 attachers per pole (including the Pole Owner). While recognizing that the Commission's presumptions of 3 attachers (non-urbanized) and 5 attachers (urbanized), including

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<sup>12</sup> *Id.*

<sup>13</sup> *Coalition Comments*, pp. 39-41

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the pole owner, “do not reflect present pole attachment reality,”<sup>14</sup> ATT/Verizon propose that 4 attachers (including the Pole Owner) be presumed on all poles. Even the USTelecom Proposal (see below) recommends a “non-rebuttable” average number of 3 attachers (including the Pole Owner). In light of the record in this proceeding, the presumed number of attachers should be 3, not 4 as recommended by ATT/Verizon.

- iv. **Presumed Amount of Occupied Space.** ATT/Verizon extend to ILECs the presumption of 1’ of space occupied by cable and CLECs attachers. For 50 years or more, however, ILECs typically have occupied or reserved for themselves up to 3’ of space on Electric Utility poles. Any presumptions should be based on the existing evidence and historic practices, not on a recently fabricated figure designed solely to reduce pole attachment rental rates.

- b. **USTelecom Proposal.** The USTA Proposal also unduly favors ILECs and other broadband attachers and disadvantages Electric Utilities and their consumers. USTelecom’s proposed allocation of costs is so unreasonable that it appears designed solely to make the ATT/Verizon proposal look more attractive by comparison.

- i. **Extension of Cable Rate Calculation Methodology.** The USTelecom Proposal perpetuates the faulty Cable Rate Methodology by extrapolating the Usable Space Percentages throughout the entire pole rather than recognizing (as the ATT/Verizon Proposal does) that “Unusable” (or, more appropriately, “Common”) Space costs should be split equally by the Pole Owner and all attachers.
- ii. **Communications Worker Safety Zone.** As with the ATT/Verizon proposal, USTA also proposes that the entire 40-inch CWSZ be assigned exclusively to the Pole Owner. The effect is more egregious here, however, since the distorted Usable Space Percentages are then extrapolated to costs throughout the entire pole, thereby disproportionately increasing the Pole Owner’s share and reducing the communications

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<sup>14</sup> ATT/Verizon Proposal, p. 3.

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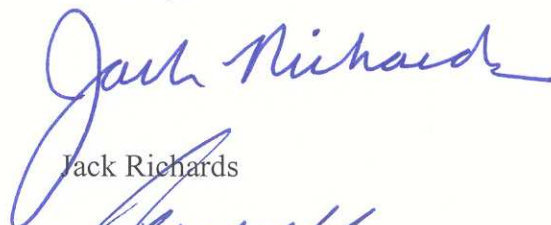
attachers' rental rates. If the CWSZ costs were removed from the 13.5' of presumed Usable Space (as they appropriately could be), or even split equally by all attachers including the Pole Owner (as proposed by the *Coalition* in its Comments), then USTA's 22% of Usable Space assigned to the non-Pole Owner attachers would rocket to 31.17% ( $1 - 7/10.17$ ) and 39.93% ( $1 - (7 + 1.11)/13.5$ ), respectively.

- iii. **Number of Attaching Entities.** The sole positive aspect of USTA's proposal is its recognition that, including the Pole Owner, there are only three attaching entities on an average pole.

For these reasons and others, the *Coalition of Concerned Utilities* urges the Commission to reject the broadband attachment rate proposals submitted by ATT/Verizon and USTelecom. Instead, to achieve rate parity, the Commission should adopt the *Coalition's* proposal, which rejects the ILECs' illegitimate claim to lower, regulated rates and eliminates the subsidies now unfairly provided to cable companies and CLECs. Cable companies and CLECs should fairly compensate pole owners by sharing equally in the costs associated with 100% of the common space on poles, including the "communications worker safety zone," and the presumptive average number of attaching entities should be no more than three, as the record in this proceeding reflects.

Your attention to this matter is appreciated. Should you have any questions or require any additional information, please feel free to contact the undersigned.

Sincerely,



Jack Richards



Tom Magee

Cc: Chairman Martin  
Commissioner Adelstein



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Commissioner Copps  
Commissioner McDowell  
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Jonathan Reel  
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